Hj Maamor bin Hj Abdul Manap v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42–39 OF 2000
AUGUSTINE PAUL J
28 OCTOBER 2002

Criminal Law *— Penal Code — s 405 — Criminal breach of trust — Evidence adduced by prosecution showed that money had been disbursed as loans — Whether accused had dishonestly misappropriated or converted to his own use the sums of money — Whether accused had dishonestly used or disposed of the money in violation of any direction of law prescribing the mode in which the money was to be used or of any legal contract — Whether prosecution had made out a case under s 405 of the Penal Code*

Criminal Procedure *— Charge — Alteration or amendment of — Amendment of charge by sessions court judge — Sessions court judge failed to allow accused to recall or re-summon and examine witness after amendment of charge — Whether there was a miscarriage of justice — Whether verdict can be sustained — Criminal Procedure Code s 162*

Two charges of criminal breach of trust were preferred against the accused in the sessions court at Kuala Lumpur. The case for the prosecution was that the accused had committed criminal breach of trust of the sums of money enumerated in the two charges in his capacity as an agent of Kerambit Sdn Bhd ('KSB'). The accused had entered into various agreements with shareholders of KSB to purchase their shares and the accused ultimately became the majority shareholder in KSB through his company called Kota Warisan Sdn Bhd ('KWSB'). The purchase of KSB's shares was paid for by the accused partly with his own money and partly by way of inter company loans from KSB to KWSB, which by then had become KSB's holding company. The subject matter of the charges against the accused was represented by six cheques issued by KSB. The payment vouchers of the respective cheques indicated that their purpose was to lend to KWSB. KSB's financial controller ('PW21') testified that those payments were inter company loans. However, PW21 was not aware of any board resolution passed pertaining to the grant of the loans. The accused was then the managing director of KSB. At the close of the case for the defence, the learned sessions court judge substituted the words 'perjalanan urusan kamu sebagai ejen' (or 'in the course of your transaction as an agent') in both the charges with the words 'sifatnya sebagai ejen' (or 'in his capacity as an agent') in view of the amendment to s 409 of the Penal Code. He then found the accused guilty on both the charges and convicted and sentenced him. This was the accused's appeal against the convictions and sentences.

Held, acquitting and discharging the accused:

(1) The first two limbs of s 405 of the Penal Code dealt with misappropriation and conversion while the third limb dealt with use of property in violation of any direction of law or of any

A contract. The evidence adduced by the prosecution showed that the sums of money had been disbursed as loans. This was reflected by the various payment vouchers which were tendered in evidence by the prosecution. PW21 was also not examined further on his evidence that the payments were inter company loans. If that was the way the accused had utilized the funds of KSB, it cannot be said B that he had dishonestly misappropriated or converted to his own use the sums of money in question. Thus, in order to sustain its case the prosecution ought to have led further evidence to show that the description of the sums disbursed as loans in the various payment vouchers was a sham to cover up their unauthorized use C by the accused. It was only then that a finding can be made that the accused had dishonestly misappropriated the sums of money involved (see p 677D–F, H–I).

(2) Section 409A of the Penal Code only applied when the open appropriation or the recording of the appropriation was set up as a defence by the accused. That was not the position here as the D records relating to the disbursement of the sums of money as loans were adduced in evidence by the prosecution in support of its case. Further, before s 409A can be activated there must be evidence to show that there was appropriation of property. It was only then that s 409A would apply to bar the accused from setting up the defence that it was openly appropriated or that the E appropriation was duly recorded. In the instant case, the evidence adduced by the prosecution did not show that the accused had appropriated the sums of money in question in the first place. Hence, s 409A did not apply to preclude a finding that the sums of money disbursed were done so as loans. It F followed that there was no evidence to show that the accused had dishonestly misappropriated the sums of money involved. (see p 678A–D).

(3) In the absence of any direct evidence to establish a dishonest intention, the prosecution was entitled to rely on s 409B of the Penal Code to raise the presumption of dishonest G misappropriation. However, before the presumption can be activated, the prosecution must first prove that the accused had misappropriated the sums of money involved. In the instant case, there was no evidence of this ingredient. Accordingly, the presumption invoked by the learned sessions court judge under s H 409B to show that the misappropriation was dishonest cannot be sustained (see p 678D, H–I).

(4) The remaining matter for consideration was whether the accused had dishonestly used or disposed of the sums of money in violation of any direction of law prescribing the mode in which the money was to be used or of any legal contract, express or implied, I which he had made touching the use of such sums as provided by the third limb of s 405. As to whether the conduct of the accused amounted to a violation of any direction of law, the only relevant

provision of law seemed to be s 132(1) of the Companies Act 1965, which imposed the duty on a director to act honestly and use reasonable diligence in the discharge of the duties of his office at all times. However, as there must be a degree of specificity in the direction of law in question, s 132(1) of the Companies Act 1965 cannot therefore be construed as a 'direction of law' for the purpose of the third limb of s 405. In any event, if the prosecution were to rely on the third limb of s 405 of the Penal Code, the charges against the accused ought to have specified the particular direction of law or contract that has been breached. Even if not so specified, evidence ought to have been led to identify the breach. That was not done by the prosecution (see pp 678I–679A, C–G); *Cheam Tat Pang v Public Prosecutor* [1996] 1 SLR 541 followed.

(5) In the circumstances, the prosecution had not made out a case under all the limbs of s 405 of the Penal Code and in view thereof, the accused ought not to have been called upon to enter his defence (see p 679G).

(6) The procedure to be followed once an amendment was made to a charge after the commencement of a trial was to take the plea of the accused to the amended charge pursuant to s 159 of the Criminal Procedure Code and thereafter allow the accused to recall or re-summon and examine, with reference to such alteration or addition, any witness who may have been examined under s 162 of the Criminal Procedure Code. In this case, the learned sessions court judge read and explained the amended charges to the accused who claimed trial. However, the judge felt that the amendments did not require any further evidence and he proceeded to find the accused guilty. The learned sessions court judge, in proceeding to find the accused guilty immediately after the accused had claimed trial to the amended charges based on an opinion that he himself had formed, had deprived the accused of the opportunity to exercise his right under s 162 of the Criminal Procedure Code. This had resulted in a clear violation of the mandatory provisions of s 162. The need for the learned sessions court judge to have given an opportunity to the accused to recall and examine witnesses assumed greater significance in view of his amendment to the charges which were otherwise defective. The trial proper can be said to have begun only after the validation of the charges. It was only then that the accused can consider the proper defence to be advanced. Thus, the need for the accused to have been given the opportunity to recall and examine any witness whom he considered necessary was very significant. The law made it plain that it was for the accused to decide on the materiality of a witness and not the court as was done in this case. This had caused a miscarriage of justice and the resultant verdict cannot therefore be sustained (see pp 681D–E, 682C–F).

A **[Bahasa Malaysia summary**

Dua pertuduhan pecah amanah dibuat terhadap tertuduh di mahkamah sesyen Kuala Lumpur. Kes pihak pendakwaan adalah bahawa tertuduh telah melakukan kesalahan pecah amanah ke atas sejumlah wang yang disebut di dalam dua tuduhan tersebut dalam
B keupayaannya sebagai seorang ejen Kerambit Sdn Bhd ('KSB'). Tertuduh telah mengikat pelbagai perjanjian dengan pemegang saham KSB untuk membeli saham mereka dan tertuduh akhirnya menjadi pemegang saham majoriti dalam KSB menerusi syarikatnya yang bernama Kota Warisan Sdn Bhd ('KWSB'). Belian saham KSB dibayar oleh tertuduh, sebahagiannya dengan wang sendiri dan
C sebahagian yang lain dengan pinjaman antara syarikat, dari KSB kepada KWSB, yang pada masa itu telah menjadi syarikat pemegang KSB. Perkara tuduhan terhadap tertuduh diwakili oleh enam cek yang dikeluarkan oleh KSB. Baucar bayaran untuk cek masing-masing menunjukkan bahawa tujuan mereka adalah sebagai pinjaman kepada KWSB. Penguasa kewangan KSB ('PW21') memberi keterangan
D bahawa bayaran tersebut merupakan pinjaman antara syarikat. Walau bagaimanapun, PW21 tidak sedar tentang mana-mana resolusi lembaga pengarah yang meluluskan pinjaman tersebut. Tertuduh merupakan pengarah urusan KSB pada masa itu. Di penutup kes pihak pembelaan, hakim mahkamah sesyen yang arif mengganti
E perkataan-perkataan 'perjalanan urusan kamu sebagai ejen' (or 'in the course of your transaction as an agent') dalam kedua-dua tuduhan dengan perkataan-perkataan 'sifatnya sebagai ejen' (atau 'in his capacity as an agent') memandangkan pindaan kepada s 409 Kanun Keseksaan. Beliau kemudiannya mendapati tertuduh bersalah atas kedua-dua tuduhan dan menyabit dan menghukum tertuduh. Ini
F merupakan rayuan tertuduh terhadap sabitan dan hukuman.

Diputuskan, melepas dan membebaskan tertuduh:

(1) Dua bahagian pertama s 405 Kanun Keseksaan adalah berkaitan penyalahgunaan dan penukaran sementara bahagian ketiga
G adalah berkaitan penggunaan harta yang melanggar mana-mana arahan undang-undang atau kontrak. Keterangan yang dikemukakan oleh pihak pendakwaan menunjukkan bahawa wang telah dibayar sebagai pinjaman. Ini dibayangkan oleh pelbagai baucar bayaran yang dikemukakan dalam keterangan oleh pihak pendakwaan. SP21 juga tidak disoal sisat selanjutnya
H atas keterangannya bahawa bayaran tersebut adalah pinjaman antara syarikat. Sekiranya begitulah tertuduh menggunakan tabung KSB, ia tidak boleh dikatakan bahawa beliau telah menyalahguna secara tidak jujur atau menukar untuk kegunaan sendiri jumlah wang yang dipersoalkan. Justeru itu, bagi mempertahankan kesnya, pihak pendakwaan seharusnya
I mengemuka keterangan lanjut untuk menunjuk bahawa gambaran jumlah yang dibayar sebagai pinjaman dalam pelbagai baucar bayaran merupakan satu kepura-puraan untuk melindungi

penggunaan haram mereka oleh tertuduh. Hanya ketika itu barulah satu keputusan boleh dicapai bahawa tertuduh telah menyalahguna jumlah wang yang terbabit secara tidak jujur (lihat ms 677D–F, H–I). A

(2) Seksyen 409A Kanun Keseksaan hanya terpakai apabila penggunaan terbuka sebagai milik sendiri atau catatan penggunaan dibina sebagai satu pembelaan oleh tertuduh. Ini tidak merupakan kedudukan di sini oleh kerana rekod-rekod berkaitan pembayaran jumlah wang tersebut sebagai pinjaman dikemukakan dalam keterangan oleh pihak pendakwaan bagi menyokong kesnya. Selanjutnya, sebelum s 409A boleh digiatkan mestilah wujud keterangan untuk menunjukkan berlakunya penggunaan hartanah untuk milik sendiri. Hanya pada ketika itulah s 409A akan terpakai untuk menghalang tertuduh daripada membina pembelaan bahawa ia digunakan secara terbuka atau bahawa penggunaan itu dicatatkan dengan sewajarnya. Dalam kes ini, keterangan yang dikemukakan oleh pihak pendakwaan tidak menunjukkan bahawa tertuduh telah mengguna jumlah wang tersebut yang dipersoalkan dari mula lagi. Justeru itu, s 409A tidak terpakai untuk mengecualikan keputusan bahawa bayaran jumlah wang dilakukan sebagai pinjaman. Ini bermaksud bahawa tiada keterangan untuk menunjukkan bahawa tertuduh telah menyalahguna jumlah wang yang terlibat secara tidak jujur (lihat ms 678A-D). B C D E

(3) Dalam ketiadaan apa-apa keterangan langsung untuk membukti niat tidak jujur, pihak pendakwaan berhak bergantung pada s 409B Kanun Keseksaan untuk menimbulkan tanggapan salahguna untuk milik sendiri secara tidak jujur. Namun demikian, sebelum tanggapan boleh dilakukan, pihak pendakwaan mestilah membuktikan terlebih dahulu bahawa tertuduh telah menyalahguna jumlah wang yang terlibat. Dalam kes ini, tiada keterangan tentang perkara ini. Oleh itu, tanggapan yang diguna oleh hakim mahkamah sesyen yang arif di bawah s 409B untuk menunjukkan penyalahgunaan adalah tidak jujur tidak boleh dipertahankan (lihat ms 678D, H–I). F G

(4) Satu lagi perkara untuk dipertimbangkan adalah sama ada tertuduh telah mengguna secara tidak jujur atau melupuskan jumlah wang tersebut berlanggaran dengan mana-mana arahan undang-undang yang menetapkan cara bagaimana wang tersebut hendaklah diguna atau mengenai mana-mana kontrak undang-undang, secara nyata atau tersirat, yang telah diikatnya yang menyebut penggunaan jumlah demikian seperti yang diperuntukkan oleh bahagian ketiga s 405. Berhubung sama ada kelakuan tertuduh tersebut melanggar mana-mana arahan undang-undang, satu-satunya peruntukan undang-undang yang relevan nampaknya adalah s 132(1) Akta Syarikat 1965, yang mengenakan kewajipan ke atas seorang pengarah untuk bertindak secara jujur dan mengguna ketelitian munasabah dalam H I

melaksana tugas-tugas jawatannya pada semua masa. Namun demikian, oleh kerana mesti wujudnya darjah kekhususan dalam arahan undang-undang yang dipersoalkan, s 132(1) Akta Syarikat 1965 dengan itu tidak boleh ditafsirkan sebagai satu 'direction of law' untuk tujuan anggota ketiga s 405. Walau bagaimanapun, sekiranya pihak pendakwaan bergantung pada anggota ketiga s 405 Kanun Keseksaan, tuduhan terhadap tertuduh seharusnya menyatakan secara khusus arahan undang-undang atau kontrak tertentu yang telah dimungkiri. Biarpun tidak dinyatakan sedemikian, keterangan sepatutnya dikemukakan untuk mengenal pasti kemungkiran. Ini tidak dilakukan oleh pihak pendakwaan (lihat ms 678I–679A, C–G); *Cheam Tat Pang v Public Prosecutor* [1996] 1 SLR 541 diikut.

(5) Dalam keadaan sedemikian, pihak pendakwaan tidak membuktikan kes di bawah segala anggota s 405 Kanun Keseksaan dan memandangkan keadaan begitu, tertuduh tidak seharusnya dipanggil memasukkan pembelaannya (lihat ms 679G).

(6) Prosedur yang harus diikut sebaik sahaja satu pemindaan dibuat kepada satu tuduhan selepas mulanya perbicaraan adalah untuk mengambil rayuan tertuduh terhadap tuduhan terpinda menurut s 159 Kanun Acara Jenayah ('KAJ') dan selepas itu membenarkan tertuduh memanggil semula atau saman semula dan memeriksa semula, dengan merujuk kepada perubahan atau tambahan sedemikian, mana-mana saksi yang telah disoal siasat di bawah s 162 KAJ. Dalam kes ini, hakim mahkamah sesyen yang arif telah membaca dan menjelaskan tuduhan terpinda kepada tertuduh yang menuntut dibicarakan. Walau bagaimanapun, hakim berpandangan bahawa pindaan tersebut tidak memerlukan apa-apa keterangan lanjut dan beliau terus mendapati tertuduh bersalah. Hakim mahkamah sesyen yang arif, dalam terus memutuskan tertuduh bersalah dengan serta merta selepas tertuduh telah menuntut dibicarakan terhadap tuduhan terpinda berdasarkan hemat yang beliau sendiri telah bentuk, telah melucutkan peluang tertuduh untuk melaksanakan haknya di bawah s 162 KAJ. Ini telah mengakibatkan perlanggaran peruntukan mandatori s 162. Keperluan untuk hakim mahkamah sesyen yang arif untuk memberi peluang kepada tertuduh agar dapat memanggil semula dan memeriksa saksi menjadi amat penting memandangkan pindaan kepada tuduhan yang sebaliknya tidak sempurna. Perbicaraan yang betul boleh dikatakan bermula hanya selepas pengesahan tuduhan. Hanya pada masa itu barulah tertuduh boleh menimbangkan pembelaan yang wajar dikemukakan. Justeru itu, keperluan untuk tertuduh diberikan peluang memanggil semula dan memeriksa mana-mana saksi yang dianggapnya perlu adalah amat penting. Undang-undang menyatakan dengan jelas bahawa tertuduh adalah pihak yang harus memutuskan kepentingan seseorang saksi dan

bukannya mahkamah sebagaimana yang dilakukan dalam kes ini. Ini telah menyebabkan kegagalan keadilan dan dengan itu keputusan yang berpunca darinya tidak boleh kekal (lihat ms 681D–E, 682C–F).] A

Notes B

For cases on alteration or amendment of charge, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 792–855.

For cases on s 405 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1455–1458.

C

Cases referred to

Cheam Tat Pang & Anor v PP [1996] 1 SLR 541 (folld)
Chew Poh Kiong v PP [2001] 4 MLJ 280 (refd)
Chhankka Dhanuk & Ors v Emperor AIR 1927 Pat 398 (refd)
Hazara Singh & Ors v Emperor AIR 1926 Lah 60 (refd) D
Mahipul Bahadur Singh & Ors v The State (1986) Cri LJ 1851 (refd)
Mohan Lal v King-Emperor AIR 1924 All 665 (refd)
Nagendra Nath Sen v Emperor AIR 1932 Cal 486 (refd)
SN Puri v State of Rajasthan (1971) 3 SCR 497 (refd)
Surajmal Sharma & Ors v The State AIR 1950 Cal 471 (refd)
Yeow Fook Yuen & Anor v R [1965] 2 MLJ 80 (refd) E

Legislation referred to

Companies Act 1965 ss 132(1), 133A
Criminal Procedure Code ss 158, 159, 162 F
Penal Code ss 405, 409A, B

Appeal from: Arrest Case No 3–62–97 of 1996 (Sessions Court, Kuala Lumpur)

Ng Aik Guan (*Adenan bin Ismail* with him) (*Adenan & Assoc*) for the appellant. G

Anselm Charles Fernandis (*Musnaliza bte Mustaq Khan* with him) (AG's Chambers) for the respondent.

Augustine Paul J: Two charges of criminal breach of trust were preferred against the accused in the sessions court at Kuala Lumpur. He claimed trial to both the charges which were amended at the close of the case for the prosecution case to read as follows: H

First Charge

Bahawa kamu di antara 22hb Oktober 1993 dan 31hb Disember, 1993 di Pejabat Kerambit Sdn Bhd, No 19, Jalan Raja Abdullah, Kg Baru, Kuala Lumpur dalam Wilayah Persekutuan sebagai seorang Pengarah Urusan Kerambit Sdn Bhd, yang diamanahkan dengan penguasaan ke atas harta/dana syarikat iaitu wang di dalam akaun bank No 301 201000 001 di HongKong Bank Berhad, Leboh Ampang, Kuala Lumpur dalam perjalanan urusan kamu I

A sebagai ejen syarikat telah melakukan pecah amanah jenayah berkenaan dengan harta/dana tersebut iaitu wang berjumah RM90,000 dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 409 Kanun Keseksaan.

Second Charge

B Bahawa kamu diantara 10hb Mei, 1994 dan 19hb Oktober, 1994 di Pejabat Kerambit Sdn Bhd, No 19, Jalan Raja Abdullah, Kg Baru, Kuala Lumpur dalam Wilayah Persekutuan sebagai seorang Pengarah Urusan Kerambit Sdn Bhd, yang diamanahkan dengan penguasaan ke atas harta/dana syarikat iaitu wang di dalam akaun bank No 301 201000 di Hong Kong Bank Bhd, Leboh Ampang, Kuala Lumpur dalam perjalanan urusan kamu sebagai C ejen syarikat telah melakukan pecah amanah jenayah berkenaan dengan harta/dana tersebut iaitu wang berjumlah RM10,482 dan oleh itu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan.

At the close of the case for the defence, the learned sessions court judge substituted the words 'perjalanan urusan kamu sebagai ejen' in both the D charges with the words 'sifatnya sebagai ejen' in view of the amendment to s 409 of the Penal Code ('s 409') with effect from 17 September 1993. He then found the accused guilty on both the charges and convicted and sentenced him. This appeal is by the accused against the convictions and sentences.

E The case for the prosecution is that the accused committed criminal breach of trust of the sums enumerated in the two charges in his capacity as an agent of Kerambit Sdn Bhd ('KSB'). KSB is the holding company of Kerambit Industries Sdn Bhd ('KISB'). The accused had entered into various agreements with shareholders of KSB to purchase their shares and by March 1993 had become the majority shareholder in KSB through his F company called Kota Warisan Sdn Bhd ('KWSB'). The purchase of KSB's shares were paid for by the accused partly with his own money and partly from KSB's inter company loans to KWSB as its new holding company. Ho Tet Shin ('PW21') was the financial controller of KSB. The subject matter of the first charge against the accused is represented by three cheques G marked as exhs P29, P40 and P45 while the subject matter of the second charge are another three cheques marked as exhs P31, P33 and P37. Exhibit P29 is a cheque for RM75,000 payable to KWSB and its purpose is stated in the payment voucher ('exh P28') as 'Being Loan to Parent Company'. Exhibit P40 is a cheque for RM10,000 payable to one Hairi Mohd Salleh and its purpose is stated in the payment voucher ('exh P39') as 'Being Loan H To Kota Warisan'. Exhibit P45 is a cash cheque for RM5,000 and its purpose is stated in the payment voucher ('exh P44') as 'Being Advance to Kota Warisan'. Exhibit P31 is a cash cheque for RM7,000 and its purpose is stated in the payment voucher (exh P30) as 'Being Loan To Kota Warisan Sdn Bhd'. Exhibit P33 is a cash cheque for RM2,000 and its purpose is stated in the payment voucher ('exh P32') as 'Being Loan To Kota Warisan I Sdn Bhd'. Exhibit P37 is a cash cheque for RM1,432 and its purpose is stated in the payment voucher ('exh P36') as 'Being Presentation Expenses to Mindef by Norinco On 19 October 1994'. As PW21 said:

All those payments were inter company loan. I was not aware of any Board Resolution of the loan or rectifying it. The decision for the inter company loan was that of OKT. OKT then was the Managing Director in Kerambit Sdn Bhd.

In dealing with the ingredients to be proved by the prosecution, the learned sessions court judge said in his judgment:

Tertuduh telah dituduhkan di bawah seksyen 409 Kanun Keseksaan. Di bawah s 409 ingredien yang perlu dibuktikan ialah:

(i) Tertuduh telah diamanahkan harta Syarikat dalam kapasitinya sebagai agen Syarikat.

(ii) Tertuduh telah melakukan pecah amanah ke atas harta yang diamanahkan.

(iii) Ia melakukan pecah amanah dengan niat yang curang.

With regard to proof of the first ingredient, he said:

SP2 telah mengesahkan bahawa tertuduh telah dilantik sebagai Pengarah Urusan Syarikat Kerambit Sdn Bhd. Sebagai seorang Pengarah tertuduh boleh dianggap sebagai seorang agen kepada Syarikat tersebut. Dalam kes *Periasamy* ([1996] 2 MLJ 557 at p 575), Gopal Sri Ram JCA telah menyatakan demikian:

'A managing director of a company has, no doubt, been held by the general law to be an agent of the company ...'

SP8 telah mengesahkan tertuduh telah diberi kuasa untuk menandatangani cek bagi pihak Syarikat dan ini dengan sendirinya menunjukkan tertuduh telah diamanahkan dengan harta Syarikat.

With regard to proof of the second ingredient, he said:

Bagi maksud kes ini yang relevan adalah tertuduh telah gunakan harta yang diamanahkan untuk faedah diri sendiri. Ini jelas dibuktikan apabila pembayaran dibuat bagi faedah satu Syarikat yang lain yang dimiliki oleh tertuduh dan isterinya dan pembayaran lain juga untuk faedah tertuduh serta keluarganya.

Tertuduh dalam pembelaan menyatakan semua pembayaran ini telah direkodkan dan dibuat secara terbuka. Bagi saya ini bukan satu pembelaan dengan adanya seksyen 409A ...

With regard to proof of the third ingredient, he said:

Seterusnya seksyen 409B KK memperuntukkan demikian: ... ...

Dari bacaan seksyen ini adalah jelas bahawa adalah beban ke atas tertuduh untuk membuktikan di atas imbang kebarangkalian bahawa ia tidak berniat curang.

Dalam kes ini tertuduh menyatakan ia dapat nasihat bagi semua soalan kewangan dari seorang yang bernama Ho Tet Chin (SP21).

Saya boleh percaya dalam soal kewangan yang rumit seperti penubuhan Syarikat untuk mengambil alih saham Syarikat Kerambit tertuduh mungkin perlukan nasihat SP21 tetapi adalah sukar untuk mempercayai bahawa bagi soalan kewangan mudah seperti bayaran untuk pembelian rumah tertuduh telah meminta nasihat ataupun memerlukan nasihat SP21.

A

> Apa yang lagi menyerlah ialah tertuduh mengetahui bahawa terdapat beberapa bantahan terhadapnya mengambil Syarikat Kerambit dan ada beberapa pemegang saham yang belum dibayarnya nilai saham mereka. Oleh itu adalah rumusan saya tertuduh melakukan pecah amanah di sini dengan niat yang curang.

B The first matter for consideration in this appeal is whether the finding made by the sessions court that the prosecution has made out a case before calling for the defence is regular on the evidence adduced. There are several ways in which the offence of criminal breach of trust can be committed as stipulated in s 405 of the Penal Code ('s 405') which reads as follows:

C

> Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'.

D

The first two limbs of the section deal with misappropriation and conversion while the third limb deals with use of property in violation of any direction of law or of any contract. The evidence adduced by the prosecution show that the sums of money which make up the offences with E which the accused has been charged have been disbursed as loans. This is reflected by the various payment vouchers which were tendered in evidence by the prosecution. PW21 was also not examined further on his evidence that the payments were inter company loans. If that was the way the accused had utilized the funds of KSB, it cannot be said that he had dishonestly misappropriated or converted to his own use the sums of money in F question. In *SN Puri v State of Rajasthan* (1971) 3 SCR 497, it was held that the word 'entrusted' is used in s 409 of the Penal Code in a wide sense and include all cases in which property is voluntarily handed over for a specific purpose and is dishonestly disposed contrary to the terms on which possession has been handed over. As *Ratanlal & Dhirajlal's Law of Crimes* (24th Ed) Vol 2 says at p 1980:

G

> Dishonest intention is the gist of the offence. Any breach of trust is not an offence. It may be intentional without being dishonest or it may appear dishonest without being really so.

In *Mahipul Bahadur Singh & Ors v The State* (1986) Cri LJ 1851, it was held H that where the accused had deposited some trust money in fixed deposits in their own names and had shown to the auditors this money as belonging to the trust no offence of criminal breach of trust could be made out. Thus, in order to sustain its case, the prosecution ought to have led further evidence to show that the description of the sums disbursed as loans in the various payment vouchers is a sham to cover up their unauthorized use by the I accused. It is only then that a finding can be made that he had dishonestly misappropriated the sums of money involved. I am aware of s 409A of the Penal Code ('s 409A') which reads as follows:

> It is no defence for any offence prescribed in sections 403, 404, 405, 406, 407, 408 and 409 to show that the property was openly appropriated or that the appropriation was duly recorded and entered in the books and accounts of any company or association or body of persons whether incorporated or not.

I am of the view that this section does not apply to displace the view that I have expressed earlier for two reasons. Firstly, the section only applies when the open appropriation or the recording of the appropriation is set up as a defence by the accused. That is not the position in this case as the records relating to the disbursement of the sums of money as loans were adduced in evidence by the prosecution in support of its case. Secondly, before the section can be activated there must be evidence to show that there was appropriation of property. It is only then that the section will apply to bar the accused from setting up the defence that it was openly appropriated or that the appropriation was duly recorded. The evidence adduced by the prosecution does not show that the accused had appropriated the sums of money in question. Section 409A therefore does not apply to preclude a finding that the sums of money disbursed were done so as loans. It follows that there is no evidence to show that the accused had dishonestly misappropriated the sums of money involved. However, in the absence of any direct evidence to establish a dishonest intention the prosecution is entitled to rely on s 409B of the Penal Code ('s 409B') which reads as follows:

> (1) Where in any proceeding it is proved —
>
> (a) for any offence prescribed in sections 403 and 404, that any person had misappropriated any property; or
>
> (b) for any offence prescribed in sections 405, 406, 407, 408 and 409, that any person entrusted with property or with dominion over property had —
>
> (i) misappropriated that property;
>
> (ii) used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract, express or implied which he had made touching the discharge of such trust; or
>
> (iii) suffered any person to do any of the acts described in subparagraph (i) or (ii) above:
>
> it shall be presumed that he had acted dishonestly until the contrary is proved.
>
> (2) The presumption under subsection (1) shall apply *mutatis mutandis* to the offences prescribed in sections 109 and 511 of the Code in relation to any of the offences referred to in that section.

It must be observed that before the presumption contained in s 409B can be activated the prosecution must first prove that the accused had misappropriated the sums of money involved. As I said earlier, there is no evidence of this ingredient. Thus, the presumption invoked by the learned sessions court judge under s 409B to show that the misappropriation was dishonest cannot be sustained. In the circumstances, it is my view that the prosecution had not made out a case under the first two limbs of s 405. The remaining matter for consideration is whether the accused had dishonestly

used or disposed of the sums of money in violation of any direction of law prescribing the mode in which the money is to be used or of any legal contract, express or implied, which he has made touching the use of such sums as provided by the third limb of s 405. This is the appropriate limb under which the accused ought to have been charged if the manner in which he had used the funds of KSB was in breach of his obligation to KSB to use its funds in a particular way. In order to make out a case of criminal breach of trust, the prosecution ought to have led evidence to show that the description of the sums disbursed as loans was a sham. This could be proved by showing that the act of the accused was a violation of any direction of law or of any legal contract with regard to the use of the funds with which he had been entrusted. As to whether the conduct of the accused amounts to a violation of any direction of law, the only relevant provision of law seems to be s 132(1) of the Companies Act 1965 ('s 132(1)') which reads as follows:

> A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

In *Cheam Tat Pang & Anor v Public Prosecutor* [1996] 1 SLR 541, it was held that the word 'mode' in the third limb in s 405 connotes that there must be a degree of specificity in the direction of law in question. As Yong Pung How CJ added at p 548:

> It should not be construed so expansively as to extend to a general direction to 'act honestly'. On this analysis, there was clearly serious difficulty with the respondent's reliance on s 157(1) of the CA (our s 132(1)) in the present case. This section mirrors a director's general fiduciary duty at common law.

Section 132(1) cannot therefore be construed as a 'direction of law' for the purpose of the third limb of s 405. With regard to the contractual obligation of the accused it is true that there was no Board Resolution of KSB to authorize him to make the loans that he had made. In the absence of such a resolution the disbursement of the sums of moneys involved as loans by the accused may only amount to an offence under s 133A of the Companies Act 1965. However, it must be noted that if the case of the prosecution is to fall under the third limb of s 405 the charge ought to have specified the particular direction of law or contract that has been breached. Even if not so, specified evidence ought to have been led to identify the breach. That was not done. The corollary is that the accused ought not to have been called upon to enter his defence in view of the failure of the prosecution to make out its case.

Be that as it may, and in any event, there are certain other features in the conduct of the trial that warrant serious consideration. I consider it sufficient to deal with just one matter.

As I said in an earlier part of the judgment, the learned sessions court judge amended the charges against the accused at the close of the case for the defence. The reason why he did so and the course he adopted is best understood by referring to the relevant part of his judgment which reads as follows:

> Adalah nyata selepas seksyen 409 KK dipinda keputusan di atas tidak lagi terpakai memandangkan selepas pindaan tidak perlu dibuktikan bahawa tertuduh telah melakukan pecah amanah dalam *perjalanan perniagaannya sebagai seorang ejen* tetapi adalah memadai untuk membuktikan bahawa tertuduh telah bertindak dalam *kapasitinya sebagai ejen.*
>
> Mengambilkira pandangan ini saya dapati tuduhan yang dikenakan terhadap tertuduh adalah tidak tepat memandangkan terdapat perkataan *urusan sebagai ejen* dalam tuduhan. Seterusnya saya telah menggunakan budibicara saya di bawah seksyen 158 Kanun Acara Jenayah untuk meminda tuduhan dengan menggugurkan perkataan *urusan sebagai ejen* dan digantikan dengan perkataan dalam *sifatnya sebagai ejen* dalam kedua-dua tuduhan yang dikenakan terhadap tertuduh. Tuduhan pindaan ini telah dibacakan dan diterangkan kepada tertuduh dan ia masih meminta bicara. Saya dapati pindaan ini tidak memerlukan keterangan lanjutan memandangkan kedua-dua tuduhan adalah masih berdasar kepada fakta yang sama.

As the offences alleged to have been committed by the accused took place after the amendment to s 409, the charges framed against him prior to their alteration by the learned sessions court judge are clearly defective in law. To that extent the learned sessions court judge must be commended for having amended the charges. In doing so he had acted under s 158 of the Criminal Procedure Code. However, what warrants serious consideration is whether what he did thereafter is in accordance with law. He had complied with s 159 of the Criminal Procedure Code ('s 159') in taking the plea of the accused to the amended charges. The accused had claimed trial. The objection taken by the defence is that he did not comply with s 162 of the Criminal Procedure Code ('s 162') which reads as follows:

> Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to such alteration or addition, any witness who may have been examined, and may also call any further evidence which may be material.

This section does not mean that whenever the court alters the charge after the commencement of the trial an accused person has an absolute right to recall and examine a witness. It only applies where the application to recall a witness has reference to the altered charges (see *Yeow Fook Yuen & Anor v R* [1965] 2 MLJ 80). In that event, the examination of the witness must be confined to the alteration in the charge. As Martineau J said in *Hazara Singh & Ors v Emperor* AIR 1926 Lah 60 at p 61:

> The right is thus not restricted to the re-calling of those witnesses only who have deposed to the subject matter of the alteration or amendment in the charge. The other witnesses also may conceivably be in a position to depose to facts in connection with such alteration or amendment. All that the court can do is to restrict the examination of the witness to the alteration or amendment in the charge.

When the section applies, it is mandatory to allow witnesses to be recalled even if the alteration has not prejudiced the accused. In this regard, I refer to *Nagendra Nath Sen v Emperor* AIR 1932 Cal 486 where Pearson and McGhose JJ said at p 487:

A It may be that the alteration did not in fact prejudice the accused in any way, but it is to be observed that s 231 Criminal PC does not leave any discretion to the trying magistrate. The section is mandatory. It states that in a case of an alteration after the commencement of the trial the accused shall be allowed to recall or resummon and examine any witness who may have been examined.

B Similarly Allanson and Sen JJ said in *Chhanka Dhanuk & Ors v Emperor* AIR 1927 Pat 398 at p 400:

But once a charge has been altered or added to, the provisions of s 231 apply. The learned sessions judge was bound to recall any witness which the prosecution or the accused desired to examine, with reference to the alteration C or addition. I agree that it is difficult to see what further questions could have been asked, but the provisions of the section are peremptory.

It follows that the right is exercisable even though the purpose of recalling a witness is not material. The section also applies even if the alteration is not material particularly where the accused has been asked to plead to the D amended charge (see *Surajmal Sharma & Ors v The State* AIR 1950 Cal 471). The court has no discretion to refuse an application to recall a witness. The court must therefore give the accused an opportunity to exercise this right (see *Mohan Lal v King-Emperor* AIR 1924 All 665).

Thus the procedure to be followed once an amendment is made to a charge after the commencement of a trial is first to comply with s 159 and E thereafter with s 162. In this case, the learned sessions court judge read and explained the amended charges to the accused who claimed trial. However, he felt that the amendments did not require any further evidence and proceeded to find the accused guilty. In dealing with the procedure adopted by the learned sessions court judge, I can do no better than refer to the F illuminating judgment of Ian Chin J in *Chiew Poh Kiong v Public Prosecutor* [2001] 4 MLJ 280 where his Lordship said at pp 287–288:

It is obvious from the judgment itself that the pronouncement of guilt was only made after the charge was amended. Therefore, the amendment was in order. This brings me to the next question of what the court was required to do after the charge was amended. Section 158(2) of the CPC comes into play and it G requires the amended charge to be read and explained to the accused. This, the lower court appeared to have done. In fact, the lower court proceeded with calling on the accused to plead to the amended charge, and this was obviously done in compliance with s 159 of the CPC which says:

'When trial may proceed immediately after alteration or addition

H If a charge is framed or alteration or addition made under either of the last two preceding sections, the Court shall forthwith call upon the accused to plead thereto and to state whether he is ready to be tried on such charge or altered or added charge. If the accused declares that he is not ready, the Court shall duly consider the reasons he may give and if proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the I conduct of the case, the Court may, in its discretion, after such charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered or added charge had been the original charge.'

> That provision envisages that there should be a trial when the accused pleads not guilty to an amended charge. In this case the accused pleaded not guilty but the lower court nevertheless proceeded to convict him. I can find no provision in the law where the court can find an accused guilty of an offence after he has pleaded not guilty to an amended charge. In the present case, the lower court must have been under the misconception that the choice of the accused to remain silent after being called to enter upon his defence still pertains. But that was in relation to the previous charge. There is now a new amended charge which the accused had pleaded not guilty and following which the prosecution and the accused may recall witnesses for examination under s 162 of the CPC. The lower court should have asked both the prosecution and the defence as to whether any witnesses need to be further examined and thereafter called for the defence. Instead of doing that he straightaway convicted the accused despite the plea of not guilty and without calling for him to enter upon his defence on the new charge. This is clearly not in accordance with the CPC and illegal. The conviction and sentence cannot stand and is therefore set aside.

The learned sessions court judge, in proceeding to find the accused guilty immediately after the accused had claimed trial to the amended charges based on an opinion that he himself had formed, had deprived the accused of the opportunity to exercise his right under s 162. This has resulted in a clear violation of the mandatory provisions of s 162. The need for the learned sessions court judge to have given an opportunity to the accused to recall and examine witnesses assumes greater significance in view of his amendment to the charges which were otherwise defective. The trial proper can be said to have begun only after the validation of the charges. It is only then the accused can consider the proper defence to be advanced. Thus the need for the accused to have been given the opportunity to recall and examine any witness whom he considered necessary is very significant. The law that I have discussed earlier makes it plain that it is for the accused to decide on the materiality of a witness and not the court as done in this case. This has caused a miscarriage of justice and the resultant verdict cannot therefore be sustained.

In the upshot, I allowed the appeal and acquitted and discharged the accused on both the charges.

The accused acquitted and discharged.

Reported by Lim Lee Na